

Page 1

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 18-23538-rdd

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7 | In the Matter of:

8

9 SEARS HOLDINGS CORPORATION, et al.,

10

11 | Debtors.

12

14 | Page

15 | United States Bankruptcy Court

16 300 Quarropas Street, Room 2

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19 Novembe

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22 | B E F O R E:

23 HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Page 2

1 Ch 11

2 2:30 PM

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4 Notice of Adjournment of Hearing: Notice of Rescheduling of
5 November 18, 2020 Hearing to November 20, 2020 at 2:30 p.m.
6 (EST)

7

8 TELEPHONIC HEARING re Motion to Compel: Motion of Community
9 Unit School District 300 to Deem Economic Development
10 Agreement Rejected Pursuant to the Debtors Confirmed Chapter
11 Plan, or, in the Alternative, to Compel the Debtors to
12 Reject the Agreement (related document(s)5492) (ECF #9061)

13

14 TELEPHONIC HEARING re Objection to Motion of Community Unit
15 School District 300 to Deem Economic Development Agreement
16 Rejected Pursuant to the Debtors Confirmed Chapter 11 Plan,
17 Or, In the Alternative, to Compel the Debtors to Reject the
18 Agreement (related document(s)9061) filed by Michael L.
19 Schein on behalf of Village of Hoffman Estates (ECF #9079)

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1 TELEPHONIC HEARING re Debtors' Opposition to the Motion of
2 Community Unit School District 300 to Deem the Economic
3 Development Agreement Rejected or, in the Alternative, to
4 Compel Debtors to Reject the Agreement (related
5 document(s)9061) filed by Sunny Singh on behalf of Sears
6 Holdings Corporation (ECF #9082)

7

8 Statement: Exhibit A to Motion of Community Unit School
9 District to Deem Economic Development Agreement Rejected
10 Pursuant to the Debtors' Confirmed Chapter 11 Plan, or, in
11 the Alternative, to Compel the Debtors to Reject the
12 Agreement (related document(s)9061) filed by Allen G. Kadish
13 on behalf of Community Unit School District 300 (ECF #9062)

14

15 Supplemental Statement: Supplement to Motion of Community
16 Unit School District 300 to Deem Economic Development
17 Agreement Rejected Pursuant to the Debtors' Confirmed
18 Chapter 11 Plan, or, in the Alternative, to Compel the
19 Debtors to Reject the Agreement (related document(s)9061)
20 filed by Allen G. Kadish on behalf of Community Unit School
21 District 300 (ECF #9071)

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1 Declaration of Jared R. Friedmann in Support of the Debtors'
2 Opposition to the Motion of Community Unit School District
3 300 to Deem the Economic Development Agreement Rejected or,
4 in the Alternative, to Compel Debtors to Reject the
5 Agreement (related document(s)9082) filed by Sunny Singh on
6 behalf of Sears Holdings Corporation (ECF #9084)

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8 Notice of Agenda of Matters Scheduled for Telephonic Hearing
9 on November 20, 2020 at 2:30 p.m.

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25 Transcribed by: Lisa Beck

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon. This is Judge Drain.
3 And we're here in In re Sears Holdings Corporation, et al.
4 This is a completely telephonic hearing. You should
5 identify yourself and your client the first time you speak.
6 It's also a good idea to do that if you speak later so we
7 can be sure the court reporter can put together your voice
8 with your name.

9 There's one authorized recording of this hearing.
10 It's taken by Court Solutions. If you want a transcript,
11 you should contact our clerk's office to arrange for the
12 preparation of one.

13 You should keep your phone on mute at all times
14 unless you're speaking. And, of course, unmute yourself
15 when you do want to speak.

16 So with that introduction, I have the agenda.
17 There's really, I think, just one matter on today's agenda.
18 The rest of the matters are adjourned. So unless we --
19 unless someone wants to raise some other point first, why
20 don't we proceed to the motion of Community Unit School
21 District 300 which obviously -- which was a school district
22 to deem EDA agreement, or economic development agreement,
23 rejected pursuant to the debtors' confirmed Chapter 11 plan
24 or, in the alternative, to compel the debtors to reject the
25 agreement.

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1 So unless anyone wants to cover any other matter
2 before we turn to that motion, I think I should hear from
3 the school district counsel since it's their motion.

4 MR. GENSBURG: Thank you, Your Honor. Matt
5 Gensburg on behalf of the school district. With me is Alan
6 Kadish from Archer & Griner and Kenneth Florey from Robbins
7 Schwartz.

8 Your Honor, this motion was filed for the basic
9 reason that Sears no longer has any economic interest in the
10 EDA agreement. Further, other than Transform Holdco, there
11 is no one else that Sears could legally assign the EDA
12 agreement to. And Transform Holdco, Your Honor, saw,
13 subject to resolution of this motion, has indicated it's
14 willing to withdraw its designation.

15 THE COURT: Well, let's focus on that language
16 because I think that's the reason you filed it. You have a
17 specific agreement with Transform Co (sic) which is in the
18 record. So let's focus on paragraph 2 of that agreement.
19 Do you have that in front of you?

20 MR. GENSBURG: I can get it, Your Honor.

21 THE COURT: Okay. I prefer focusing on the actual
22 facts as opposed to broad generalities. And I think the
23 agreement is the first fact we should focus on.

24 (Pause)

25 THE COURT: You should also get Section 13 of the

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1 plan in front of you since we'll be focusing on that, too.

2 MR. GENSBURG: Yes, Judge.

3 (Pause)

4 MR. GENSBURG: Sorry, Your Honor. I'm trying to
5 track down the Transform agreement.

6 THE COURT: Okay.

7 (Pause)

8 THE COURT: It wasn't attached, I believe, to the
9 motion but it was attached as an exhibit to the declaration
10 of Jared Friedmann in support of the debtors' opposition to
11 the motion.

12 MR. GENSBURG: Okay, Judge. Thank you.

13 THE COURT: Okay. I'm not sure what exhibit it is
14 to that declaration. Exhibit 2 to his declaration.

15 (Pause)

16 THE COURT: Well, maybe I should just read it.

17 Okay?

18 MR. GENSBURG: That's fine, Judge.

19 THE COURT: All right. So paragraph 2 of the
20 settlement agreement in the Cook County Chancery Division
21 litigation, which is undated on the signature page, and I
22 don't think has actually been -- well, the signature page is
23 undated. I think there is reference in the record to the
24 fact that it actually was executed October 27, I believe.

25 But in any event, paragraph 2 of that settlement

1 agreement, which is between the school district and
2 Transform, is headed "Actions to Implement Agreement". And
3 then it says "Transform and the Plaintiffs agree that the
4 following actions will be taken to implement the terms of
5 this Settlement Agreement." And then 2(a) says:

6 "Upon execution by Sears and District 300" --
7 that's the school district -- "of an Order and Stipulation
8 in the form attached to and included in this Agreement as
9 Exhibit A, stipulating to (i) Transform's irrevocable
10 withdrawal of its designation of the EDA Agreement as an
11 executory contract to be assumed and assigned to Transform
12 pursuant to the terms of the APA; and (ii) Sears?
13 irrevocable rejection of the EDA Agreement pursuant to
14 Section 365 of the Bankruptcy Code and the terms of the
15 Plan, as the same has been modified and amended; then within
16 1 business day after Sears executes the EDA Stipulation,
17 Transform shall execute and Transform and [the school
18 district] shall file the EDA Stipulation with and for
19 approval by the Bankruptcy Court."

20 And then subparagraph (b) goes on to say:

21 " In the event that Sears does not execute the EDA
22 Stipulation by October 30, 2020, District 300 shall, no
23 later than November 3, 2020, file a motion in the Bankruptcy
24 Court, in form and substance reasonably satisfactory to each
25 of District 300 and Transform, to compel Sears to

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1 immediately reject the EDA Agreement upon Transform's
2 withdrawal of its designation of the EDA Agreement as an
3 executory contract to be assumed and assigned to Transform
4 pursuant to the terms of the APA, and Transform shall,
5 concurrently with the filing of said motion, file a notice
6 in the Bankruptcy Court that it shall withdraw said
7 designation contingent on Sears' rejection."

8 And then "Within 1 business day after the...Court
9 grants [that motion]" -- this is in subparagraph (c) --
10 "...Plaintiffs as applicable and Transform shall request the
11 Court in the Illinois Action to enter, and Plaintiffs as
12 applicable and Transform shall diligently pursue, an Order
13 that is final and appealable per Rule 304(a) for the Village
14 to release the 55% Portion of the 2018 EDA Funds to the
15 Taxing Districts."

16 Paragraphs 3, 4 and 5 then lay out the
17 consideration that each side is providing to the other upon
18 the agreement becoming effective including ultimately the
19 potential for \$2.9 million to be paid to Transform.

20 Now I gather that Sears never signed the
21 stipulation. Correct?

22 MR. GENSBURG: That's correct, Judge.

23 THE COURT: Okay. And has Transform filed a
24 notice that it shall withdraw the designation?

25 MR. GENSBURG: It has, Your Honor.

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1 THE COURT: It has? Because that's not attached
2 anywhere to any motion.

3 MR. GENSBURG: It was -- my belief, Your Honor,
4 and Mr. Kadish can maybe confirm this, is that we filed a
5 supplement that included that statement.

6 THE COURT: Well, there was a pleading filed on
7 November 15th as a reply. Anyway, I haven't seen it. Do we
8 have Transform's counsel on the phone?

9 No. I guess not.

10 Okay.

11 MR. GENSBURG: I believe it was, Your Honor. And
12 I -- my recollection is it was filed by Transform in the
13 record. And I believe --

14 THE COURT: So why is --

15 MR. GENSBURG: Go on.

16 THE COURT: I'll take your word for it although I
17 don't actually have it here. And indeed, the binder of
18 material -- actually, let me correct that. Maybe I do -- I
19 have something called a "Supplement" here. So let me look
20 for that.

21 MS. MARCUS: Your Honor, this is Jacqueline Marcus
22 from Weil on behalf of the debtors.

23 THE COURT: Right.

24 MS. MARCUS: If I may help a little bit, we do
25 believe that Transform filed a notice. They entitled it --

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1 I think in the body it says it's a conditional withdrawal of
2 the designation.

3 THE COURT: Okay. So it hasn't really withdrawn.

4 It's conditioned on things happening vis-?-vis Sears, right?

5 MR. GENSBURG: Yes, Judge. It's conditioned --

6 THE COURT: And that this is kind of -- I mean, it
7 has the right to withdraw under the APA. Is there any
8 disagreement about that?

9 MR. GENSBURG: No, Judge.

10 THE COURT: Okay. So why all these conditions?
11 Why are the conditions on top of that?

12 MR. GENSBURG: Transform wanted to withdraw the
13 designation as part of a global settlement upon the debtor
14 formally rejecting the EDA agreement --

15 THE COURT: Right.

16 MR. GENSBURG: -- which is, I believe, Your Honor,
17 reflected in paragraph 2 that you just read.

18 THE COURT: Right. That seemed clear to me that
19 there was some extra value to either the district or
20 Transform -- and one could infer that some portion of the
21 2.9 million is attributable to it -- in this extra condition
22 happening. Right?

23 MR. GENSBURG: That's correct, Your Honor. And
24 really --

25 THE COURT: Okay.

1 MR. GENSBURG: And Mr. Florey can go into --

2 THE COURT: So let's turn to the plan then. All
3 right? Because, of course, the plan is the governing
4 document. And, in fact, it's binding on the parties.

5 Section 13. -- well, Section 13 of the plan deals
6 with executory contracts and unexpired leases. It states:

7 "On the Effective Date" -- which is the effective
8 date of the plan, which I believe no one contends has
9 occurred yet -- "except as otherwise provided in the Plan or
10 Plan Supplement, each Executory Contract...not previously
11 rejected, assumed, or assumed and assigned shall be deemed
12 automatically rejected pursuant to sections 365 and 1123 of
13 the Bankruptcy Code..."

14 All right? So just with regard to that clause,
15 the plan provides the contracts that have previously been
16 rejected, assumed or assumed and assigned shall be deemed
17 rejected. Not before then.

18 And then it goes on to say:

19 "...unless such Executory Contract...(1) as of the
20 Effective Date is subject to a" -- as of the effective date
21 again -- "is subject to a pending motion to assume such
22 Unexpired Lease or Executory Contract (including, for the
23 avoidance of doubt, (i) any Unexpired Lease subject to a
24 consensual extension of the deadline..., and (ii) any
25 Executory Contract noticed for assumption and assignment

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1 with a pending objection that has not yet been resolved);
2 (2) is a contract, engagement letter that has been approved
3 by an order of the Bankruptcy Court, release, or other
4 agreement or document entered into in connection with the
5 Plan; or (3) is a D&O Policy or an Insurance Contract."

6 So I read this paragraph to say that, under the
7 plan, contracts that are not subject to a pending motion to
8 assume, or a pending objection that has not yet been
9 resolved with respect to a motion for assumption and
10 assignment, shall be deemed rejected but only deemed
11 rejected on the effective date. And, of course, we're not
12 at the effective date.

13 Now, of course, Transform can withdraw its pending
14 -- its desire to have this contract assigned to it. And
15 there's, in essence, an objection over that that is pending,
16 which would mean that if something else hasn't happened to
17 this contract before the effective date, it would be deemed
18 rejected on the effective date. But it seems clear to me
19 that the parties have agreed to these conditions that we
20 started with by describing, in paragraph 2(b) and (c) of the
21 settlement agreement, and in Transform's notice of
22 withdrawal -- conditional notice of withdrawal -- because
23 they wanted to change this language and have the contract
24 actually be rejected not on the effective date but post-
25 confirmation and pre-effective date. Right? There's no

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1 other reason to do this that I can see to put in these
2 conditions.

3 MR. GENSBURG: Well, Your Honor, that's correct.

4 THE COURT: Okay.

5 MR. GENSBURG: But to keep --

6 THE COURT: So then the question is, can that
7 happen? Is that possible? So let's focus on that. What
8 permits that to happen? What permits that condition to be
9 fulfilled?

10 MR. GENSBURG: I'm not following, Your Honor --
11 Matt Gensburg. Excuse me for not identifying myself.

12 THE COURT: Well --

13 MR. GENSBURG: I'm not following --

14 THE COURT: -- your motion seeks two forms of
15 relief. One is to have an order entered deeming the
16 contract rejected. I don't see how that is possible under
17 the language of the plan that I just read to you which is
18 triggered by the effective date. And we're not at the
19 effective date.

20 MR. GENSBURG: Well, we are, Judge --

21 THE COURT: We are --

22 MR. GENSBURG: I'm sorry.

23 THE COURT: Well, let me get out both of them
24 because I'm trying to make it clear -- I'm trying to make my
25 question clear to me.

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1 The other form of relief that you seek is relief
2 under 365(d)(2) of the Bankruptcy Code to compel the debtor
3 to assume or reject the agreement.

4 Now -- so why don't we address both of those two
5 arguments in the light of Section 13.1 of the plan?

6 MR. GENSBURG: I will, Your Honor. Matt Gensburg
7 on behalf of the school district.

8 So I think -- I think the way I visualize this --
9 we also have to consider what it means to go effective. And
10 in that point that really hasn't been discussed, including
11 Article 14 of the plan, which states that the plan will go
12 effective -- will not go effective until the conditions
13 precedent have occurred, which they have not occurred.

14 THE COURT: Well, I agree.

15 MR. GENSBURG: And Your Honor's --

16 THE COURT: The plan -- I don't think there's any
17 issue. I don't think the debtors would dispute that the
18 Chapter 11 plan has not gone effective. The effective date
19 has not occurred. Right?

20 MR. GENSBURG: Your Honor --

21 THE COURT: The debtors don't dispute that, right?

22 MS. MARCUS: No, Your Honor. They don't dispute
23 that factually --

24 THE COURT: Okay. All right.

25 MR. GENSBURG: And, Your Honor, paragraph 4 of the

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1 confirmation order, which states: "The terms of the Plan,
2 the Plan Supplement, the Liquidating Trust Agreement, all
3 exhibits thereto, and all other relevant and necessary
4 documents shall be effective and binding as of the Effective
5 Date."

6 The fact of the matter is, this plan is not yet
7 binding on anyone because it hasn't gone effective. That's
8 the common meaning of "effective date" in all contracts.
9 The date that the contract, and the plan certainly is a
10 contract, binds the parties. And it hasn't. Simply hasn't.

11 The Court in Dawes described it, Your Honor, as
12 the date that the obligations are -- kick in.

13 And so, what this created -- and this was over a
14 year ago. What this creates is this void where the plan is
15 not yet binding on anyone because it hasn't gone effective
16 and yet, Sears is arguing but we're bound by the terms of
17 the plan.

18 THE COURT: Well, but let -- can I interrupt you
19 for a second? If that is the case that the plan
20 indisputably has been confirmed, where's their authority to
21 reject the agreement?

22 MR. GENSBURG: Well, you have to also ask yourself
23 what's the consequence of it not going effective.

24 THE COURT: Well, that's fine.

25 MR. GENSBURG: I mean --

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1 THE COURT: But again, 365, by plain terms, and
2 the Courts have already modified this by applying
3 1123(b)(2), but 365 itself provides that you can assume or
4 reject a contract before the confirmation. And obviously,
5 now confirmation has occurred. So where's the authority to
6 do it post-confirmation?

7 MR. GENSBURG: Well, it's in 13.1 of the plan has
8 not gone effective. I guess --

9 THE COURT: You just told me that that provision
10 isn't binding. So --

11 MR. GENSBURG: I understand that.

12 THE COURT: -- again, if you're looking to apply
13 365 without 1123 then the Code says you can only do it
14 before confirmation.

15 MR. GENSBURG: Judge, Matt Gensburg.

16 I would be the first one to tell you that there's
17 a circularity here that's disturbing. And in most cases,
18 this simply doesn't arise because the plans go effective
19 within 10 days, 14 days after it's confirmed and not a year
20 or over a year.

21 But that same circularity ties into your
22 discussion of 13.1 because what you're saying is --

23 THE COURT: Well, all right. Let me --

24 MR. GENSBURG: -- if it has been --

25 THE COURT: I'm going to interrupt you. Let me --

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1 I'll accept your argument that the plan itself is not yet
2 controlling because it has not gone effective. But doesn't
3 that just throw you back to 365 and the need to assume or
4 reject before the effective date?

5 MR. GENSBURG: I think what it brings us back
6 to --

7 THE COURT: I'm talking before the confirmation
8 date -- excuse me. Before the confirmation date?

9 MR. GENSBURG: Yes, sir. I think where it brings
10 us back in a minimum is back to the Bankruptcy Code. And if
11 the plan is not what's governing the relationships of the
12 parties -- and we know for a fact it's not -- your paragraph
13 4 in the confirmation order says it's not. Their paragraph
14 14 in the plan says it's not. No one is bound by this
15 agreement yet.

16 I don't know exactly why it hasn't gone effective.
17 I'm assuming these are decisions being made by debtor and
18 debtors' counsel and maybe the committee and other parties-
19 in-interest, but it hasn't. And so, in that void, the only
20 thing that can govern is Section 365 of the Bankruptcy Code.

21 THE COURT: Okay. So --

22 MR. GENSBURG: And --

23 THE COURT: -- let's turn to 365(d)(2). 365(d)(2)
24 says, "In a case under chapter 11 of this title, the trustee
25 may assume or reject an executory contract...at any time

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1 before the confirmation of a plan."

2 MR. GENSBURG: That's correct.

3 THE COURT: The plan has been confirmed. But the
4 plan's been confirmed. And now you're asking to compel the
5 debtor to reject post-confirmation.

6 MR. GENSBURG: That's all correct, Judge. And I
7 think in this situation where we have this confusion that's
8 arising because of a plan that has not effective therefore
9 is not binding. In order to avoid what appears to be an
10 authoritative void of what governs the parties, I think this
11 is exactly what Section 105(a) contemplates. And I think
12 this is exactly the situation where the Court needs to
13 consider the equities of the situation to determine what's
14 appropriate.

15 So while Sears and The Village use the plan and
16 the argument that this is functionally -- you know, the plan
17 says when they can assume and the effective date hasn't
18 occurred so we can't force them to do this, yet that very
19 agreement is not binding on me or anyone. Asking for it
20 both ways -- we're not bound by it but you are. With
21 respect to this, you are. That's not right. And yet, I
22 understand this problem with 362 (sic) that references the
23 confirmation date.

24 But the second part of 362 is still also binding
25 which is that the Court has authority in appropriate

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1 circumstances to accelerate what other date exists. And
2 I'll add, Judge, that Section 1123(b)(2) which is the
3 predicate for Sears doing what it's done with 13.1 which is
4 the ability to assume or reject pursuant to a plan, Section
5 1323 (sic) (b)(2) specifically says that it's subject to
6 Section 365. That even when you're going to assume a
7 contract pursuant to the terms of a plan, it's still
8 pursuant to Section 365. It doesn't say Section 365(a) or
9 (b). It references 365 in its totality which would include,
10 I'd propose, 365(b)(2), at least the second portion of it.
11 The portion of 365(b)(2) authorizes this Court, upon
12 appropriate circumstances, to accelerate the date. And we
13 believe, Judge --

14 THE COURT: Well, can I interrupt you, though?

15 Again --

16 MR. GENSBURG: Yes, sir.

17 THE COURT: -- now you're arguing 1123 and the
18 plan. I'm just -- you know, if you're going to do that, we
19 could do that. But I'm just focusing on your first argument
20 which is that 1123 doesn't apply here because the plan isn't
21 effective which, to me, throws me back on the Code which
22 specifically states you can assume or reject as a debtor-in-
23 possession before confirmation of a plan. And then turning
24 to 105(a) of the Code -- and the case law is crystal clear
25 on this -- the Court may issue an order that is necessary or

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1 appropriate to carry out the provision of the title not to
2 contradict the provisions of the title. And here, the
3 provision that would be contradicted is the provision of
4 365(b)(2) that would require that assumption or rejection be
5 before confirmation of the plan.

6 Now I don't really know what to say in response to
7 that other than that. You point to the second clause. But
8 I don't see how one can direct a trustee to determine within
9 a specified time whether to assume or reject if the first
10 clause of this section says you can only do it before
11 confirmation. It would seem to me that therefore the
12 logical reason -- reading of the second clause is shortening
13 the time to before confirmation. But(b)(2) looks like a
14 grant of power. And it says before confirmation of a plan.

15 Now Courts have ruled, including the Seventh
16 Circuit in the United Airlines cases that, under 1123, a
17 plan can provide for an extension of that time post-
18 confirmation if it specifically does. And, of course, it
19 does say subject to but given the deadline in (d)(2), those
20 Courts -- and they're pretty well established law at this
21 point -- have read out that deadline, I think because the
22 plan is confirmed and it's binding.

23 But again, if you're going to contend that 1123
24 doesn't even apply because the plan isn't effective yet,
25 then I think you're stuck with (b)(2), 365(b)(2).

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1 MR. GENSBURG: Your Honor, so we've made this
2 argument in the alternative because -- but when you look at
3 it, you're struck by this inconsistency that is really
4 frustrating. So -- and it becomes really clear when Sears
5 argues that we're bound by 13.1 because, like I said, that
6 creates this conundrum of, well, I guess some of it's
7 binding notwithstanding your Court's order and the
8 confirmation order, paragraph 4, notwithstanding --

9 THE COURT: I --

10 MR. GENSBURG: -- Article 14.

11 THE COURT: Fine. I'm accepting all of your
12 arguments on that point. I'll hear Ms. Marcus on it. But,
13 for example, I don't think at this point that the debtors
14 could take action contrary to the plan. They have an
15 obligation to live up to the plan and in good faith seek its
16 effective date. So I expect she'll probably be making that
17 argument to me.

18 But I'm accepting your point on that. So I don't
19 need to hear you try to refute it anymore. I'm just
20 focusing on 365(d)(2) now.

21 MR. GENSBURG: Right. So the alternative
22 argument, Your Honor, would be even if 13.1 somehow impacts
23 the school district, then 1123(b)(2) says that that
24 provision would still be subject to 365.

25 THE COURT: All right.

1 MR. GENSBURG: And that's --

2 THE COURT: We're going in circles. I mean, look,
3 there are many cases that hold that you can use 1123 because
4 it's -- through a plan to have a contract be rejected or
5 assumed after the confirmation date. Some of those
6 points --

7 MR. GENSBURG: And I'm not disagreeing.

8 THE COURT: -- even -- what?

9 MR. GENSBURG: And I'm not disagreeing with that,
10 Judge.

11 THE COURT: All right. So --

12 MR. GENSBURG: So the point is this.

13 THE COURT: -- implicit in those cases -- and, in
14 fact, explicit in some of them, is attention with the
15 subject to language in 1123(b)(2) because if it really is
16 completely subject to 365, it means it's also subject to
17 365(d)(2) with temporal limitation on the -- that can't be
18 assumed or rejected by the confirmation -- after the
19 confirmation date.

20 Notwithstanding that, the Seventh Circuit in *In re*
21 UAL Corp., you know, the district court of the District of
22 Idaho and DJS Properties, L.P. v. Simplot and the bankruptcy
23 court in *In re Gunter Hotel Associates* from Texas, *In re*
24 Malden Mills, Inc. from Massachusetts. And the cases that
25 they cite all say you could do it under 1123. But again, I

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1 don't know why we're going over this because at one point,
2 you're trying to -- you're arguing, and hypothetically I'm
3 accepting your argument, that because the plan has not gone
4 effective, 1123 doesn't even come into it. Paragraph 13.1
5 doesn't even come into it. But I don't see how that helps
6 you because then you're stuck with 365(d)(2).

7 MR. GENSBURG: So, Judge, let me try to clarify.
8 And I apologize that I haven't been very articulate here on
9 this 1123 premise.

10 If the premise is that, as an alternative, that we
11 are bound by 13.1 -- which the only way that arises is
12 through 1123(v)(2) which we accept. And I also accept the
13 concept that 1123(b)(2) is the mechanism by which, as the
14 cases indicate as you noted, Your Honor, by which an
15 executory contract can be assumed and assigned or rejected
16 post-confirmation. What happens is that this plan that's
17 plan that's been confirmed has made the new date rather than
18 the confirmation date, the date the plan's been confirmed,
19 the effective date. But that doesn't mean that the second
20 part of 365(d)(2) is irrelevant which is the portion that
21 says, yes, there's a cutoff date here which, under 365(d)(2)
22 prior to the plan limitation would have been confirmation.
23 But the Court can, for cause shown, accelerate that date.
24 Now with the plan being confirmed, that date is not the
25 confirmation date but the effective date. But the second

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1 portion of 365(d)(2) is still relevant which is the Court
2 has the authority, whether it's the confirmation or because
3 of the plan, the effective date, for cause shown, to
4 accelerate that date.

5 And in most scenarios where the effective date is
6 10 days, 14 days, it's not even relevant. But in this
7 situation where there's conditions precedent which haven't
8 occurred, a year has gone by and it hasn't gone effective --
9 and we don't know when it will go effective. It could be
10 next week. It could be next month or in six months.

11 The concept that the Court has no authority to --
12 for cause shown, to protect the interest of nondebtor
13 parties in that scenario seems to me to be something that
14 was not contemplated by the chapters and I don't even think
15 it was contemplated by the parties of this agreement.

16 So -- the agreement being the plan. And so, if,
17 in fact, we are bound, and this hasn't already been rejected
18 because it hasn't gone effective and the confirmation -- you
19 know, circular argument -- but we're bound by 13.1, okay.
20 Then the new cutoff date is the effective date. But still,
21 the second part of 365(d)(2) governs which is, for cause
22 shown, Your Honor, we would argue that the Court has the
23 authority to accelerate it. And again, given the delay -- I
24 mean, there's special reasons for that now.

25 THE COURT: And what are the special reasons?

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1 MR. GENSBURG: Well, the special reasons, Judge,
2 are as follows. And I may have Ken Florey, whose an expert
3 on the agreement, jump in.

4 But Sears simply has no economic interest in the
5 EDA agreement any longer.

6 THE COURT: All right. Let's --

7 MR. GENSBURG: And this --

8 THE COURT: I'm not talking about from the Sears
9 side. And I've read the agreement, although you didn't
10 discuss this issue the first time. And I've the assignment
11 provision. So Mr. Florey can get into that with me if he
12 wants to but he needs to explain to me why he only cited the
13 one subparagraph defining "Developer" and not the fact that
14 Sears itself can assign the agreement.

15 I'm focusing on harm to your client.

16 MR. GENSBURG: Yes, sir. And I'm going to ask Mr.
17 Florey, if he can, Your Honor, to respond to the Court's
18 inquiry.

19 THE COURT: Okay.

20 MR. FLOREY: Good afternoon, Judge. This is Ken
21 Florey on behalf of the school district.

22 Under the Illinois statute in EDA agreement, the
23 developer is limited to an entity that owns 100 acres or
24 more of real estate --

25 THE COURT: I just said, sir, I am focusing on the

1 harm to your client.

2 MR. FLOREY: Judge --

3 THE COURT: You have not -- you know, in a
4 pleading filed or served on the 16th, you raised new
5 arguments without reference to the agreement, which was not
6 attached, which I had to dig out. Frankly, I think they
7 were misleading when I read the agreement itself. But I
8 will not, at this point, focus on the debtors' end of
9 things. One thing is clear to me. You and Transform are
10 asking the debtor, and ultimately the debtor through me, to
11 take an action that may not be required for value to both of
12 you. It's even been quantified. \$2.9 million. So I'm not
13 really focusing on why this doesn't benefit Sears. What I'm
14 focusing on is how are your clients harmed by the delay.

15 MR. FLOREY: Judge, again, Ken Florey on behalf of
16 the school district.

17 Several things have happened. As of October 1st,
18 all of Sears' former employees now are Transform employees.

19 THE COURT: Yes.

20 MR. FLOREY: Sears no longer --

21 THE COURT: You may think this is unfair. But I'm
22 going to ask this question to you one more time. I am not
23 focusing on Sears. I'm focusing on what is the harm to your
24 clients of further delay.

25 MR. FLOREY: Your Honor, if you'll just --

1 THE COURT: I can't make it any clearer. I don't
2 need to hear your arguments which you put in your supplement
3 for November 15th without the agreement being attached as to
4 why Sears won't benefit from this. I don't need to hear
5 that. Why I need to hear is how are your clients harmed.

6 MR. FLOREY: The school district and every taxing
7 district is harmed because as soon as Sears no longer has
8 employees in the district, the district starts a dissolution
9 process. That dissolution process is a two-step process.
10 The year in which the developer has no more employees starts
11 the dissolution. One year after that, the Village has to
12 take -- mandatorily has to take steps to formally dissolve
13 the EDA district which allows all taxing districts to levy
14 taxes under the -- to assess and take advantage of assessed
15 value that is now on the taxuals. So it's a two-year
16 process.

17 The harm to the school district and every taxing
18 district is if once that first step has occurred that Sears
19 no longer has employees, and if you delay the dissolution
20 process, a subsequent year passes. If we get past January
21 1st, the EDA district can't be dissolved until 2022. If
22 Your Honor grants our request today, it can lead in starting
23 the process which would mean a dissolution in 2021.

24 So what does that mean? A year is significant in
25 assessing the value to the property taxes because then each

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1 taxing district has millions of dollars to spend on services
2 that are vitally needed, particularly in our COVID times;
3 the taxpayers will see a reduction in their tax bills
4 because there's now more assessed value to attach to for the
5 property tax levy; and every year that that new value is
6 placed on the tax rolls, it gets compounded, year after year
7 after year, based on the CPIU, consumer price index urban
8 under Illinois property tax code.

9 So --

10 THE COURT: Can I -- these are not taxes on Sears,
11 right?

12 MR. FLOREY: These would be taxes on the
13 headquarters, former Sears headquarters and the entire EDA
14 district which includes Sears and multiple other properties.

15 THE COURT: All right. But that is then taxes
16 that Transform would pay for taxes on land that Transform
17 hasn't acquired that's still in the district, right, that
18 Sears still owns?

19 MR. FLOREY: No. I don't believe Sears owns any
20 more land in the district, Judge. So this would be taxing
21 the former Sears headquarters now owned by Transform as well
22 as multiple other non-Sears-owned properties, other private
23 owner-owned properties. It's one large district. Sears is
24 the majority of that district but there are multiple other
25 properties.

1 So when Sears -- we start the dissolution process
2 -- again, it's a two-year process, the first year that
3 there's a termination and there's no longer employees of the
4 developer; and then the subsequent year, it gets terminated
5 by the Village. So whenever -- now that we're in that -- as
6 of October 1st, that the employee shift has occurred to
7 Transform and the developer is now Sears and they no longer
8 have employees, that starts -- that's the shock that starts
9 this dissolution process. And that's why we're asking you
10 to take this extraordinary action in this calendar year,
11 Judge, because if we wait till the next calendar year, it
12 pushes the final dissolution from 2021 to 2022 and that's a
13 loss of millions of dollars in perpetuity under the Illinois
14 tax code because every year that the value goes on from the
15 EDA district to the tax rolls, not only does every taxing
16 district get to access that in that year, but every
17 subsequent year, that value is added as a multiplier in the
18 consumer price index. So in perpetuity, this value gets
19 created. Every year that's delayed, there's going to be
20 lost revenue accessible by the taxing bodies.

21 THE COURT: Okay. That's helpful. Thank you.

22 So as far as the headquarters building is
23 concerned and the property that Transform has, it could
24 easily agree to waive that -- in fact, it has agreed except
25 for payments to be made to it, to waive that benefit, right?

1 Just as Sears waived it for 2018?

2 MR. FLOREY: I'm sorry. Which benefit are you
3 asking -- would you be asking Transform to waive, Judge?

4 THE COURT: The benefit under the EDA. Their tax
5 savings that the EDA provides. They can waive that.

6 MR. FLOREY: First of all, they'd have to qualify
7 for it and I don't believe they're going to qualify for it.
8 So it's not the tax benefit that's at issue. It's the
9 entire taxing district going from an EDA district to normal
10 property taxation. It's a special --

11 THE COURT: But what I'm saying is, it doesn't
12 apply to Transform in that district. It would apply to
13 anyone else in that district.

14 MR. FLOREY: No. The benefit can only be accessed
15 by Transform or whoever owns Sears headquarters.

16 THE COURT: Well, then why -- I don't understand
17 then why you're going through these conditions, why
18 Transform doesn't just agree to waive the benefit.

19 MR. FLOREY: Because you can't -- just waiving the
20 benefit is not going to lead to the dissolution of the EDA
21 district, Judge.

22 THE COURT: That's what Transform --

23 MR. FLOREY: By Transform --

24 THE COURT: Economically, they can agree to waive
25 it, can't they? Isn't that the same thing?

1 MR. FLOREY: They could.

2 THE COURT: Yeah.

3 MR. FLOREY: But then they would still be in
4 the -- until they withdrew their designation, Judge, they'd
5 be the developer in waiting. So once they've withdrawn that
6 designation, the developer name goes back to Sears. Sears
7 is giving up all economic interest so now the developer --
8 Sears has no more employees. So it's a really critical
9 step. With the withdrawal of the designation, the developer
10 status goes to Transform which has lots of employees in the
11 district, back to Sears which has no employees in the
12 district, and having no employees in the district triggers a
13 dissolution process and the two-year step.

14 THE COURT: But it doesn't seem to me to be an
15 imminent harm because for the year that you would lose --

16 MR. FLOREY: Yes.

17 THE COURT: -- if I didn't grant this relief,
18 Transform is perfectly capable of saying for that year we
19 waive the benefit. All that money will go to the Village
20 and for reallocation as per the lawsuit.

21 MR. FLOREY: So, Judge, it's not just --

22 THE COURT: The way it looks to me -- it looks to
23 me that what is being actually bargained for here is part of
24 a condition is an additional right which is to accelerate
25 the termination of the EDA.

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1 MR. FLOREY: Judge, in your courtroom, we've been
2 fighting over this 55 percent right. That's the 55 percent
3 of Transform's property tax bill. That's they either get it
4 if they hit the numbers or we get it if they don't. But
5 we're beyond that. We're not talking about that benefit.
6 We're talking about the dissolution of the entire EDA
7 district which --

8 THE COURT: Well, I know.

9 MR. FLOREY: -- is worth --

10 THE COURT: I know. But as far as -- but that's
11 not Transform's to control. What Transform can control is
12 the taxation of it. So you're really asking for other
13 relief. And you're asking the debtor to give up something.

14 MR. FLOREY: The debtor has already given up all
15 economic interest in the stipulation with the school
16 district for --

17 THE COURT: No, it has not.

18 MR. FLOREY: -- the 2017 monies.

19 THE COURT: I will rule on that right now. It
20 clearly has not. It gave up a right to the funds. Period.

21 MR. FLOREY: Judge, then you have to look at who
22 else can be an assignee. So if Transform withdraws its
23 designation, it goes back to Sears. Can Sears assign it to
24 any other entity? And Mr. Gensburg can jump in 'cause we're
25 getting into his world.

1 But under the EDA law, EDA act, there's no other
2 entity that can qualify as the developer because Transform
3 owns the property, the Sears headquarters. This is all tied
4 to the Sears headquarters.

5 THE COURT: None of that --

6 MR. FLOREY: Sears --

7 THE COURT: -- has been shown to me. You have not
8 given me the EDA law. You've given me none of that. And
9 when you quote the agreement and when you quote the EDA law,
10 you're very careful to say things like "included", "within
11 the scope of" and then said of course we're a party. So,
12 frankly, I don't believe you until I actually see it in
13 writing.

14 MR. FLOREY: We can provide you --

15 THE COURT: It looks like I shouldn't have
16 believed you that this would all take 30 to 60 days in state
17 court.

18 MR. FLOREY: Judge, there has been -- the answer
19 to that question is these are the arguments we made in our
20 original motion and Sears along with the Village other than
21 addressing the arguments that you and Mr. Gensburg were
22 addressing, they did not refute any of the things I've just
23 stated, that the --

24 THE COURT: Well, all right. Then let's read
25 Section 18.1.

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1 "The term 'Developer', as used in Section 18.1" --
2 which is the section dealing with assignment -- "shall mean
3 only" -- you quoted only the portion dealing with (iv), "Any
4 entity to whom the Developer has conveyed a portion of the
5 Subject Property consisting of one hundred (100) acres or
6 more". You didn't quote to me (a)(i): Sears, Roebuck and
7 Co.; (a)(ii), "Any entity which is a parent, controlling
8 shareholder...or more...or Any entity which is owned, to the
9 extent of at least a fifty-one percent (51%) controlling
10 interest, by Sears..."

11 So why doesn't that make it the developer that's
12 able to assign under the agreement contrary to what you
13 argued in your November 15th response?

14 MR. FLOREY: Judge, it could assign it to -- this
15 is all tied into the headquarters, to the property -- to the
16 100-acre requirement. So Sears -- the only thing that can
17 be assigned --

18 THE COURT: I read what you quoted to me in
19 paragraph 18, it says who can assign. In your response, you
20 said it cannot be assigned to someone other than the owner
21 of the 100 acres which, frankly, is not what the section you
22 quoted pertains to. That is who can assign. But if you
23 actually turn to who can be an assignee, it includes partial
24 owners.

25 So, yes. There may be some statute somewhere,

1 which you haven't provided me with, that limits that.

2 But -- paragraph 18.1(p) refers to a portion of the subject
3 property limited to 100 acres.

4 So again, I come back to one fundamental point
5 which is that I have a plan that has not gone effective.
6 Under the plain terms of the Bankruptcy Code, an executory
7 contract cannot be assumed and assigned or rejected after
8 the confirmation date. That rule is modified for confirmed
9 and arguably only an effective plan although it does say
10 just a plan can provide that. In 1123(b)(2) and substantial
11 case law that distinguishes between plans that don't
12 specifically provide for assignment or -- assumption and
13 assignment or rejection including *In re WorldCom, Inc.*,
14 where Section 8.1 of the debtors' plan contained no language
15 reserving the right to seek rejection of contracts subject
16 to confirmation. And to the contrary, plans that do, like
17 this plan, reserve the right to deal with extending the
18 rejection period.

19 Those are the two relevant documents. And it
20 appears to me that what's going on here is two nondebtor
21 parties have gotten together to try to get value for
22 themselves by changing the Bankruptcy Code and changing the
23 plan to have the entire EDA be terminated. They're trying
24 to take value from the estate.

25 If this plan does not go effective and I convert

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1 the case, or if this plan didn't provide for an extension of
2 the time to assume or reject, the agreement would just ride
3 through the bankruptcy. And then if it went into a Chapter
4 7, there would be a brief period for the Chapter 7 trustee
5 to deal with it and then it would be deemed rejected.

6 So I think you're trying to create rights here.
7 And the reason you're doing it is that they're valuable and
8 they're right now in the hands of the debtor. In fact, it
9 looks like there's significant consideration being paid to
10 follow this procedure. But it's not being paid to the
11 debtor. Normally, that's not the type of circumstance where
12 someone gets the right to accelerate the time to assume or
13 reject a contract.

14 MR. GENSBURG: Judge, Matt Gensburg. If I may
15 jump in.

16 Clearly, we see some value as Mr. Florey is trying
17 to explain to Your Honor arising from rejection of the
18 agreement. And it was that value that these taxing
19 districts, including district 300, the school district, see
20 that led us to strike our agreement with Transform Holdco
21 because they're the designee and they could try to move
22 forward with that and we'd have to fight in the state court
23 and then back to Your Honor as we know from prior hearings
24 on this 365 assumption and rejection issue like here. And
25 that'll substantial amount of time. And this value, as Mr.

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1 Florey has tried to explain, clear value (indiscernible), to
2 the school districts getting this rejected this year and the
3 other taxing bodies rather than next year or the year after.
4 That far exceeds what we proposed to provide to Transform
5 Holdco.

6 The part where there's the disconnect is the
7 belief -- and this is obviously our fault -- that Sears
8 still retains some value in this agreement after it waived
9 any rights to the 2018 funds and all funds thereafter that
10 somehow it can still capture some value. And I understand
11 where that's coming from. It's from that stipulation where
12 it was specifically reserved that the right to assume and
13 assign to the debtors' assignee. But that referred to --
14 not overtly, but was referring to Transform Holdco because
15 Transform Holdco was never a party to that stipulation order
16 entered in October.

17 Our effort to settle with Sears, and we thought we
18 had some -- everything with Sears in October, but because
19 Transform wasn't a party to the agreement and it already
20 designated it, we couldn't affect the rights under 9019.
21 Your Honor would never let us do that. And the case law is
22 clear that could happen. So we had to make sure that
23 Transform Holdco's interest in the EDA agreement was
24 preserved if it wanted to go forward. And that's what that
25 language was. But otherwise, Sears was walking away from

1 all its interest in the EDA funds from 2018 on. And EDA
2 funds are really the only economic driver behind the EDA
3 agreement. And our fault is that we haven't made that clear
4 to the Court.

5 And so, the real question is -- and it's just two
6 questions. One is after this October agreement, the
7 stipulation order, was it intended that Sears would retain
8 anything and was that referenced to debtors' assignee, a
9 reference to Transform Holdco or any potential assignee.
10 And then even if that was that reference in the stipulation
11 order to any potential assignee, could Sears at this stage
12 assign it to anyone other than Transform Holdco who has
13 indicated a willingness to withdraw its designation. And
14 that's the 100-acre issue that was discussed and apparently
15 we didn't clearly define for Your Honor because we believe
16 that it can't. There is no one else who could possibly be
17 an assignee for the EDA agreement. If that's true then
18 there is no actual value here to Sears as they sort of
19 indicated in their motion to dismiss. And therefore, the
20 inability for the school district and the library district
21 and the college district and the homeowners to get the
22 benefit of reduced taxes that will happen if the
23 headquarters go back online on the tax rolls at full value
24 will far exceed any possible harm, which is none, to Sears.
25 And that's why we filed the motion. And, yes --

1 THE COURT: I guess I have two responses to that
2 and one question. I still don't understand why that
3 economic harm, at least in the near term 'cause that's all
4 you're really addressing -- I think we could be fairly
5 confident that the plan will go effective at some point in
6 the reasonable future. That economic harm could be dealt
7 with very simply by having Transform do what Sears did and
8 just claim any interest in the portion of the taxes that
9 would otherwise come off of the back of the taxpayers for
10 the applicable year.

11 Secondly, if it were so clear that Sears has no
12 interest in this agreement, why go through the hoops of
13 paragraph 2.1 of the stipulation and settlement agreement?

14 The question I have, which we haven't addressed
15 yet, is how is the school district a party to the agreement
16 for purposes of Section 365(d)(2). What I have in your
17 response is the following. Paragraph 3 states:

18 "The Illinois General Assembly's amendment to the
19 EDA Act in 2011 legislatively recrafted the EDA Agreement by
20 grafting onto the agreement...additional Parties" -- not
21 identified, although I can infer from the first sentence in
22 paragraph 4:

23 "Pursuant to the amendment, the Taxing Districts"
24 -- a capitalized term -- "now for the first time, directly
25 shared in property taxes generated by the EDA District."

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1 And it was really they shall be allocated to them. I think
2 that was the language quoted.

3 And then paragraph 6 says -- acknowledges: "The
4 EDA Agreement itself was never actually amended to reflect
5 these modifications." Although when you look at Article 21
6 of the EDA agreement, it provides that -- it leaves to be
7 binding on the developer, it needs to be fully executed.

8 So again, other than having an interest, and it's
9 not clear to me how that interest is phrased since I haven't
10 been provided with what you're relying on -- how does having
11 an interest distinguish this situation into your being or
12 your client being a party to the agreement which is the
13 language Congress chose to use in 365(d)(2) rather than
14 party-in-interest. It says, "on the request of any party to
15 such contract...[the Court] may order the [debtor-in-
16 possession] to determine within a specified period of time
17 whether to assume or reject such contract or lease."

18 Now even on the party-in-interest point, creditors
19 of a creditor, it is well established, are not parties-in-
20 interest. But the statute says party to the agreement. So
21 how is the school district even conferred with standing
22 under 365(d)(2)?

23 MR. GENSBURG: So, Your Honor, under the original
24 EDA agreement, when the Village and Sears entered into that
25 agreement in 1989, it had a limited duration as we

1 indicated. And it was supposed to end in 2012. That
2 original agreement didn't have any of the taxing parties,
3 taxing districts, as participants in the tax revenue. That
4 agreement had it terminated in 2012 would have resulted in
5 \$27 million in additional revenue for the taxing districts
6 of which the school district would have received 60 percent
7 of it or 54.4 million -- \$15.4 million.

8 In 2011, when they amended the EDA Act to allow
9 for the extension for another 15 years, they made specific
10 reference to the taxing districts. So for the first time
11 now, under the amendment, the taxing districts can share
12 directly in the property taxes generated by the EDA
13 district. And for the first time, the Village of Hoffman
14 Estates needs to prepare annual reports to taxing districts
15 to talk about the performance of the EDA district. And for
16 the first time, the taxing districts are told to meet
17 annually to review the effectiveness of the EDA district.

18 None of these things which existed -- now the
19 actual EDA agreement wasn't amended to reflect the
20 additional 15 years. They just worked off a treaty to the
21 amendment for the EDA Act as an amendment to the agreement.
22 The very Act incorporates the taxing districts. And so, we
23 believe, Your Honor, that based on that, they are
24 effectively parties to the amended agreement, effectively
25 parties --

1 THE COURT: They're not signatories. Are they
2 listed as a party or just a recipient of the fund which go
3 through the Village first, right? That's how it works?

4 MR. GENSBURG: Yes, sir.

5 THE COURT: All right. So they weren't a party at
6 the beginning. It's now made clear in 2011 that the Village
7 has to report to them and, to the extent there was any doubt
8 before, the money and the respective proportion goes through
9 the Village to them. And so, on that basis, you're arguing
10 that they're a third party beneficiary of the agreement.

11 Right?

12 MR. GENSBURG: At a minimum, we're a third party
13 beneficiary.

14 THE COURT: Well, how are they a party? How are
15 they a party? They're not said to be a party, right?

16 MR. GENSBURG: Well, that's the point. There is
17 no actual agreement extending beyond 2012. There is no
18 agreement that you can see signatories that carry it for
19 another 15 years to 2027. There isn't any. And what
20 they've relied on, the Village, Sears, and everyone, is the
21 amendment to the agreement that makes specific reference to
22 the taxing districts.

23 THE COURT: But it makes a reference but it
24 doesn't make them a party. It makes -- it's like, you know,
25 it's like the cases that say that you will make the payment

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1 on a lease to the holder of the mortgage in certain
2 circumstances. That doesn't make the holder of a mortgage a
3 party to the contract for purposes of 365(d)(2). The
4 payment mechanism.

5 MR. GENSBURG: Your Honor, so we believe that the
6 amendment does. But if it doesn't, at a minimum, we're a
7 third party beneficiary --

8 THE COURT: But --

9 MR. GENSBURG: -- under --

10 THE COURT: -- the Code doesn't say third party
11 beneficiary. It says a party. Do you have any cases to
12 support this argument?

13 MR. GENSBURG: Well, what I can tell you, Your
14 Honor, is that third beneficiary could have the ability to
15 sue under a contract.

16 THE COURT: Do you have any --

17 MR. GENSBURG: That's standard --

18 THE COURT: -- bankruptcy cases interpreting this
19 issue?

20 MR. GENSBURG: Your Honor, I don't know of any and
21 we could find it if you would like.

22 THE COURT: Well, I mean --

23 MR. GENSBURG: But I don't believe --

24 THE COURT: -- the debtors -- both the debtors and
25 the Village made this point. And they actually did cite

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1 cases which I haven't seen refuted, including one by Judge
2 Schwartzberg. And there are numerous others including in
3 the party-in-interest context such as, for example, *In re*
4 Martin Paint Stores, 199 B.R. 258 (Bankr. S.D.N.Y. 1996).

5 But, you know, it -- when someone's standing is
6 questioned and they come up with non-bankruptcy law
7 arguments dealing with a bankruptcy law issue as opposed to
8 where the Code refers you to state law, I don't know what --
9 I mean, I don't see how you have standing.

10 MR. GENSBURG: Because a third party beneficiary
11 is a party with respect to the contract with all the
12 authority under state law to enforce that contract as if
13 they were a signatory. There's nothing unique here with
14 respect to that right that they have, under state law, under
15 Bankruptcy Code.

16 THE COURT: All right. Why don't I hear briefly
17 from the other side or the other two -- the two objectors.

18 MR. FRIEDMANN: Good afternoon, Your Honor. Jared
19 Friedmann from Weil Gotshal on behalf of the debtors. And
20 I'll be brief since a lot of these issues were already
21 addressed.

22 But the first point I was going to make which
23 you're discussing right now is that our view is the school
24 district plainly lacks standing to force the debtors to
25 reject an executory contract that it's not a party to. You

1 know, in addition to the fact that it's clearly not a party,
2 it really is about the farthest thing you can come up with
3 from being a third party beneficiary of this agreement. And
4 in fact, the school district's own -- by their own admission
5 in the very first paragraph of their motion, EDA
6 agreement -- they say the EDA agreement is preventing it
7 from receiving tax funds that it would otherwise receive
8 impacting -- and if I quote them: "not merely the 20,000
9 students in the School District, but all residents who live
10 or are served by the effected taxing authorities". That's,
11 of course, why the school district is fighting to have this
12 agreement rejected and terminated and it's why the school
13 district is willing to pay Transform almost \$2.9 million to
14 help terminate the EDA agreement. They're not a
15 beneficiary; they're harmed by this agreement. That's why
16 they want it to go away.

17 In terms of the timing issue, any monies that are
18 collected right now are not being distributed while there's
19 all these disputes going on. And as Your Honor alluded to
20 earlier, the school district asked this Court to abstain
21 from ruling on the issue of what the requirements are in
22 order for Sears or its assignee to get the EDA funds that's
23 now sitting in Cook County and that issue is being addressed
24 there.

25 But while that issue is pending, that money is all

1 just sitting in an account held by the Village earning
2 interest. So no money is being lost. Nothing's
3 disappearing. Whatever money is being collected is all
4 sitting there and it will be allocated as appropriate once
5 the Court and the county determines whether or not it should
6 be distributed to Sears as assignee at this point or that
7 they have not met the criteria and therefore it would go to
8 the taxing districts.

9 You know, in terms of standing also, with respect
10 to altering the deadline and the plan under 1127, it's very
11 clear, in Section 1127, that the provision allows
12 post-confirmation modification of the plan until a
13 substantial consummation but only by the plan proponents
14 which, obviously, again the school district is not. There's
15 nothing in Section 1127 that would give a non-proponent like
16 the school district standing to modify the plan deadline.
17 And there were --

18 THE COURT: Well, can I interrupt you?

19 MR. FRIEDMANN: Of course.

20 THE COURT: The school district contends that the
21 plan doesn't govern because it hasn't gone effective. So
22 they're relying on 365(d)(2). Do you think that the plan is
23 controlling here?

24 MR. FRIEDMANN: Yes. It's absolutely controlling.
25 We have a confirmed plan and Section 17.2 of the plan

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1 states: "On the Effective Date, the Plan shall be deemed to
2 be substantially consummated under sections 1101 and 1127(b)
3 of the Bankruptcy Code." So under that confirmed plan, by
4 definition, right now is when 1127(b) applies between the
5 confirmation and when there's substantial consummation which
6 is the effective date. So the school district, of course,
7 had an opportunity to object to the plan deadlines and
8 everything that's in 13.1 when it objected to plan
9 confirmation on numerous other grounds. Not on this ground.
10 And at this point, it's precluded from doing so.

11 The last point I just wanted to briefly address in
12 terms of the economic interest which we already heard Your
13 Honor rule on the extent of our economic interest, but in
14 terms of our ability to assign this agreement, I think what
15 the school district ignores -- and we actually have this in
16 our opposition in footnote 5 -- is that to the extent that
17 there are any restrictions on assignment of the EDA
18 agreement, obviously, under Section 365(f) of the Bankruptcy
19 Code, we may assign executory contracts even though those
20 contracts restrict their prohibited assignment. For
21 example, under *In re Eastman Kodak*, 495 B.R. 618 (Bankr.
22 S.D.N.Y. 2013).

23 But beyond that, Article 21 of the EDA agreement
24 says that we can modify the contract. So again, the school
25 district is not a counterparty to the EDA agreement but the

1 Village is. And so the Village could simply either waive
2 the assignment restrictions or agree and modify those
3 restrictions in order to provide for an assignment. So, you
4 know, the notion that we -- in the event that Transform, I
5 guess, unconditionally decides that it wishes to withdraw
6 its designation of the EDA agreement for assumption and
7 assignment, we would at that point be able to assign it to
8 another party. There very well may be interest in that.
9 Obviously, this is a very valuable agreement.

10 THE COURT: Well, can I interrupt you on that --

11 MR. FRIEDMANN: Please.

12 THE COURT: -- point? I think it's contended that
13 the entire parcel of land that's covered by the agreement is
14 now owned by Transform. I don't know if that's true but
15 assume for the moment it is true. Who and why would anyone
16 take an assignment of the agreement if they're not owning
17 the underlying land? And why would the Village amend the
18 agreement to cover something that isn't there, i.e., it's
19 already owned by someone else?

20 MR. FRIEDMANN: It's an excellent question. And
21 the issue really is, it's the economic incentive that the
22 agreement has. So the agreement -- it doesn't reward -- you
23 know, the benefit is not getting to be an EDA. The benefit
24 is being able to get money from these tax rolls which really
25 are reimbursement back to Sears for all the investment that

1 it made back when the EDA was initially developed. So under
2 the EDA agreement, one the Village, as you correctly noted,
3 Your Honor, the money flows through the Village. So under
4 that regime, the Village gets a certain amount of money
5 upfront which is part of the reason I believe the school
6 district is looking to terminate the agreement in its
7 entirety and not just have Transform waive its right to what
8 it gets because they would like to get rid of that piece
9 also. So you have a Village first picks its share which I
10 believe is a little bit over \$5 million a year. Then after
11 that, you have the rest of the monies which you'll recall
12 from our prior argument gets divvied up 55 percent to Sears,
13 45 percent to the other taxing authorities.

14 So we believe that there may be a lot of interest
15 for a third party to come in and take assignment so that
16 they would be eligible to be able to receive that 55
17 percent. And certainly, the Village would be interested in
18 helping us find an assignee because they would want to
19 protect their ability to get their \$5 million.

20 I think, though, Your Honor, what --

21 THE COURT: Well, could I ask you -- I'm sorry.
22 I'm sorry.

23 MR. FRIEDMANN: Yeah.

24 THE COURT: But could I ask you one follow-up
25 question on that?

1 MR. FRIEDMANN: Of course.

2 THE COURT: Sears did waive its right to future --
3 I forget how it was phrased, the term --

4 MR. FRIEDMANN: It would be the EDA funds going
5 forward after 2017.

6 THE COURT: Yeah. Future EDA funds after 2017.
7 So what is your response to the school district's argument
8 that any assignee would be bound by that waiver?

9 MR. FRIEDMANN: Well, we were very careful in that
10 stipulation, Your Honor. And I think that the school
11 district, you know, did acknowledge this, that there is a
12 provision -- they now say something it doesn't say. But
13 paragraph 18 of that stipulation very clearly says that
14 "nothing in this Stipulation and Order shall waive,
15 extinguish, or otherwise release the rights, if any, of
16 Debtors? assignee to the EDA Agreement, as applicable, to
17 EDA Funds levied for tax year 2018 or for any subsequent
18 years".

19 So we were very careful in reaching that agreement
20 to protect that right going forward for whether it was
21 Transform or any other assignee that we might have in the
22 event that Transform were to withdraw its designation.

23 THE COURT: Okay. And in -- the settlement
24 agreement does elsewhere refer to Transform, right? It
25 refers to -- I'm looking for it here but my recollection is

1 | that --

2 MR. GENSBURG: It's referred to in paragraph 18,
3 Your Honor.

4 THE COURT: Yeah. The parties themselves refer to
5 Transform in that agreement separately.

6 MR. FRIEDMANN: That is correct.

7 THE COURT: Okay.

8 MR. FRIEDMANN: Yeah. The last point I was going
9 to make, Your Honor, is just -- you know, and I think it's
10 probably obvious to you what's going on here is that we've
11 got an agreement that's very valuable. We've got this
12 somewhat complicated regime going on in the EDA district.
13 And there has been, you know, numerous discussions between
14 the parties to try to figure out what makes the most sense
15 going forward. And really, you know, from our perspective,
16 this was just an effort, as Your Honor said it better than
17 I'm going to now, but essentially, for the school district
18 and to transform to try to come up with a scheme where they
19 would be able to get the most value out of here including
20 taking away value that right now, valuable asset that
21 belongs to the estate. And that's really -- obviously,
22 there's no legal basis for being able to do so. They have
23 no standing for the relief they're seeking here. And for
24 all those reasons, Your Honor, we would respectfully ask
25 that their motion be denied.

1 THE COURT: Okay.

2 MR. SCHEIN: Your Honor --

3 MR. GENSBURG: Your Honor --

4 MR. SCHEIN: -- this is Michael Schein, Vedder
5 Price, on behalf of the Village, if I could have a couple
6 minutes?

7 THE COURT: Sure.

8 MR. SCHEIN: Your Honor, I won't repeat all that's
9 going on but I want to address a couple of points and one of
10 the questions you asked.

11 First of all, Your Honor, as you may recall when
12 you abstained and granted the school district to take this
13 litigation to the state court a year and a half ago, one of
14 the things that the state court had still not addressed
15 because, as we noted in our footnote, the district is still
16 stuck in first gear trying to get through on a complaint and
17 motion to dismiss. There has been no determination contrary
18 to the district's counsel's statement. There's been no
19 determination as to whether not employees but the terms
20 "job" -- there's been no determination what "jobs" means in
21 the statute, what the "EDA area" means in the statute and
22 what's the time frame in the statute. Keep in mind, Your
23 Honor, the EDA Act was not designed just for -- is not only
24 applicable just to the Sears EDA. The EDA Act would apply
25 to any other EDA developed in the state of Illinois. And

1 that's why it's drafted the way it's drafted. That's why
2 the EDA agreement was created because it's created based on
3 compliance with the Act. So that's why they won't be
4 parties to the agreement because the Act stands alone and is
5 applicable to any EDA agreement that would be in Illinois.

6 As to the jobs in the area, the EDA agreement, as
7 we interpret and we will presumably litigate before the
8 state court, covers more than the 100-acre corporate area.
9 It covers the entire agreement which is a multi-use
10 corporate park full of multiple owners of land and
11 developers within there. And those developers may very well
12 be interested in taking assignment to this EDA, Your Honor.

13 In addition, separate and apart from this EDA
14 agreement, is an EDA plan that was developed side by side
15 with the agreement. The debtors aren't a party to the plan
16 and it's not today but the plan contemplates expressly that
17 there could be multiple developers here.

18 So all we want to say is, Your Honor, as to
19 imminent harm, there is no imminent harm to the district --
20 school district here at all. It is just simply an attempt,
21 as they made clear, if they don't get rid of the EDA
22 agreement before 12/31/20 then they've got another two years
23 on their hand under the dissolution provision even if it
24 gets dissolved, and that's not a presum -- that's not
25 assumed -- even under the dissolution provisions under the

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1 EDA act. So this is just, as the parties have said, their
2 last ditch effort here to grab value and take value away
3 that may very well be valued not only for the debtors but
4 for the Village and, most importantly, for the members of
5 the EDA for which I remind the Court in our footnote no one
6 in the school district resides in EDA. No students, no
7 nothing. This is a revenue benefit for all the taxing
8 district and it is simply the school district that is
9 seeking to take a money grab.

10 Thank you, Your Honor.

11 MR. GENSBURG: Judge, Matt Gensburg. Can I just
12 address one point?

13 THE COURT: Sure.

14 MR. GENSBURG: Thank you, Judge.

15 I just want to address the point of paragraph 18
16 of the amended stipulation and order that Mr. Friedmann
17 referenced as preserving the rights of Sears to assign this
18 to -- the EDA funds to anyone. All I'm going to say is that
19 on the typical mechanisms of contract instruction, you look
20 at the whole agreement and not just a particular sentence,
21 the whole agreement as a complete document. And here, this
22 document was entered in a date at a time after Sears' plan
23 had already been filed. We had raised objections to the
24 plan and which was clear that Sears as an entity was no
25 longer operating. It was liquidating.

1 And so, the concept that Mr. Jared -- Mr.
2 Friedmann is suggesting that Sears was waiving any rights to
3 the 2018 EDA funds and future funds but not the right to
4 monetize those funds through an assignment seems absurd
5 because that means they gave up literally nothing. They're
6 not operating any longer in terms of as a retail
7 establishment other than operating to the extent necessary
8 to complete the liquidation process. And so --

9 THE COURT: Can I interrupt you? I mean, clearly,
10 they were monetizing it with Transform. So there would need
11 to be a carve-out from the waiver to make it clear that the
12 waiver of the future EDA funds wouldn't apply to Transform
13 as an assignee --

14 MR. GENSBURG: Exactly.

15 THE COURT: -- right?

16 MR. GENSBURG: Exactly.

17 THE COURT: But even though this is an agreement
18 with Transform and that uses the defined term "Transform" in
19 a number of places as well as with the Village, the actual
20 language in paragraph 18 doesn't say Transform. It says
21 "Debtors' assignee".

22 MR. GENSBURG: Yes. That's correct, Your Honor.
23 And the reason why that's there is because of the exact
24 reason you referenced. Transform was not made a party to
25 this agreement. And so there's nothing we could have done

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1 to impact -- assuming they could deal with the cure issues
2 and the other objections, impact their designation. This
3 couldn't happen. The Court wouldn't allow it. And so to
4 have it be a carve-out for them. And that was it.

5 THE COURT: Well, but it isn't -- wait a minute.
6 It isn't limited to them. It isn't limited to them. It
7 doesn't say except with regard to the rights of Transform
8 under the asset purchase agreement. It just says debtors'
9 assignee.

10 MR. GENSBURG: Right. It refers to a singular
11 debtor's assignee. And if you read it as the present tense,
12 that would be Transform. Or you could read it as the future
13 tense which means any assignee. And -- but again, you have
14 to look at it in the context of the total agreement because
15 --

16 THE COURT: You also look at it in the context of
17 Section 13.1 of the plan which is drafted -- I think the way
18 it's drafted to give the debtors flexibility until the
19 effective date to do something other than with Transform,
20 the way that provision reads. When you parse through it,
21 that's what it does.

22 MR. GENSBURG: If you interpret --

23 THE COURT: And obviously, that was front and
24 center when the parties were drafting this settlement
25 agreement because one of the forms of consideration provided

1 by the school district was withdrawing its objection to that
2 plan.

3 MR. GENSBURG: Yes, sir. But again, what -- in
4 waiving their rights to the 2018 EDA funds and future funds,
5 when they're liquidating and they simply could assign those
6 to monetize it that way, what waiver has actually occurred?
7 It just -- it's not what the parties intended. And, yes, as
8 you look at things now, 20/20 hindsight afterwards, you can
9 say, well, that should have been drafted differently. But
10 when you look at the total agreement and assuming that the
11 intent was to have agreement that made sense, they were
12 actually giving something up, and the fact that debtors'
13 assignee could be a present tense term or a future tense
14 term, but at that point in time it was a defined party,
15 which was Sears, which was Transform Holdco. An entity
16 wasn't a party to the agreement we could impact anyway. I
17 think that reflects the intent of the parties.

18 THE COURT: Well, it was giving something up. It
19 was giving up its right. And, of course, there are
20 limitations on assignment as you have argued. In other
21 words, they're not necessarily synonymous rights.

22 MR. GENSBURG: For its rights, yes, but with the
23 concept that, however -- I guess the predicate for Sears is
24 however the assignor doesn't stand in the shoes of the
25 assignee. The assignor will get -- even though Sears has

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1 given up its rights, which under normal law would mean that
2 any assignee doesn't have rights either, now the assignors
3 will have the rights. That's the distinction that's sort of
4 illogical is that Sears -- especially in a liquidation
5 scenario, Sears isn't really giving up anything. And that
6 wasn't the intent. The intent was to protect Transform
7 Holdco should it be successful with this designation.

8 THE COURT: Okay. Well, I guess that negates all
9 the arguments you were making to me that Sears itself can't
10 assign because there's no assignee that could take it.

11 MR. GENSBURG: We've made arguments in the
12 alternative, Judge.

13 THE COURT: Right. Okay. All right. Anything
14 else?

15 MR. GENSBURG: No, sir.

16 THE COURT: Okay. All right.

17 I have a motion before me by the school district,
18 as I previously defined it, Community School District 300,
19 for relief in the alternative either to deem economic
20 development agreement (EDA) rejected pursuant to the
21 debtors' confirmed Chapter 11 plan or, in the alternative,
22 to compel the debtors to reject the agreement under Section
23 365(d)(2) of the Bankruptcy Code.

24 The context of this motion is that under an asset
25 purchase agreement with Transform Holdco, Sears agreed to

1 sell substantially all of its assets to Transform Holdco
2 including its rights under designated executory contracts
3 which upon designation and approval on notice to the
4 nondebtor party or parties to the contract could be assigned
5 pursuant to Section 365 of the Bankruptcy Code. Transform
6 Holdco designated the EDA as the contract to be assigned to
7 it as a piece of other ongoing litigation in this case
8 pertaining to Sears' rights under the EDA pursued by the
9 school district in the Chapter 11 case. The school district
10 objected to that assignment which objection is still
11 pending.

12 They also made a motion to abstain from various
13 matters pending in the Sears bankruptcy case in front of me
14 in favor of litigation as it commenced pre-bankruptcy in
15 Cook County, Illinois pertaining to the school district's
16 argument that Sears was either in default under the EDA or
17 the school district was owed additional monies under the
18 flow-through provision of the EDA from the Village of
19 Hoffman Estates which was the actual party to the EDA and/or
20 Sears in terms of tax benefits that Sears would otherwise
21 receive under the EDA agreement.

22 I partially granted that motion to abstain and the
23 dispute largely moved back to the state court. After
24 summary judgment litigation was initiated in the state
25 court, the debtor, the Village and the school district

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1 entered into a stipulation of settlement resolving as far as
2 the debtor was concerned its portion of the dispute
3 pertaining to rights to the disputed EDA fund. And that
4 settlement was approved by me and after due notice on
5 October 23, 2019. That left the Village and Transform
6 Holdco still as parties to the state court litigation.

7 Quite recently, I believe roughly a year later,
8 that is, October 27, 2020, the school district and Transform
9 has entered into a settlement agreement that, subject to
10 certain conditions, would resolve Transform's piece of the
11 state court litigation that pertains to rights to EDA funds
12 from and after 2017. In the settlement stipulation with the
13 debtors and the school district, the debtors agreed to waive
14 their claims in respect of post-2017 EDA funds in return
15 for, among other things, the school district's withdrawal of
16 its objection of the confirmation of the debtors' Chapter 11
17 plan and a specified payment in respect of 2017 EDA funds,
18 in excess of \$5 million to the debtors.

19 While it appears clear to me that the school
20 district and Transform could have entered into a similar
21 stipulation simply providing for the allocation of post-2017
22 EDA funds, which would have for the foreseeable future at
23 least relieved the burden on the taxpayers of the portion of
24 those funds that would go not to local revenue but rather to
25 Transform, they have actually agreed to something different

1 which requires either agreement by the debtors to a
2 stipulation under which the debtors would reject the EDA
3 agreement pursuant to Section 365 of the Bankruptcy Code and
4 the terms of the plan which has been confirmed, or,
5 alternatively, would require a motion by the district, the
6 Court's entry of an order rejecting the EDA agreement. It
7 is only on that condition that the settlement would be
8 proposed to the state court. See paragraph 2 of the
9 Transform agreement with the school district, which is under
10 the heading "Actions to Implement Agreement".

11 Under that settlement agreement, assuming all
12 those conditions occur, and upon termination of the EDA
13 agreement, that is, under paragraphs 3, 4, and 5 and 6,
14 Transform would receive an aggregate of \$2.9 million. And
15 Transform would not seek any portion of the EDA funds or any
16 other funds related to the EDA district in the EDA agreement
17 thereafter.

18 It is of note that under the debtors' settlement,
19 prior settlement, with the school district to which
20 Transform was not a party, although the debtor or debtors
21 waived their right to further EDA funds after the 2017 EDA
22 funds payment, the parties agreed, in paragraph 18, that "
23 nothing in this Stipulation and Order shall waive,
24 extinguish, or otherwise release the rights, if any, of
25 Debtors? assignee to the EDA Agreement, as applicable, to

1 EDA Funds levied for tax year 2018 or for any subsequent
2 years."

3 Parties in that settlement agreement certainly
4 understood the role of Transform with respect to the
5 assignment of the EDA agreement under the asset purchase
6 agreement. And they refer to Transform Holdco by name in
7 paragraph 18. But in the sentence I quoted, they do not.
8 They simply refer to "Debtors' assignee".

9 Moreover, the plain, as confirmed, in Section
10 31.1, provides that only on the effective date -- or "On the
11 Effective Date, except as otherwise provided in the Plan or
12 Plan Supplement, each Executory Contract" -- and the debtors
13 have always contended that the EDA is an executory contract
14 -- "...not previously rejected, assumed, or assumed and
15 assigned shall be deemed automatically rejected pursuant to
16 sections 365 and 1123 of the Bankruptcy Code, unless" either
17 there's a pending motion "as of the Effective Date... to
18 assume such...Contract...any Executory Contract noticed for
19 assumption and assignment [as] a pending objection that has
20 not yet been resolved."

21 It is clear to me therefore under the plan that
22 the plan reserves the right to reject executory contracts
23 through the effective date. And the conditions to the
24 effective date are defined in the plan and it's acknowledged
25 by one and all that those conditions have not yet occurred.

1 And that they would then be rejected on the effective date
2 unless there was a pending motion to assume the contract or
3 a pending objection with respect to assumption and
4 assignment that has not yet been resolved.

5 There is currently a pending motion to assume and
6 assign that was objected to by the district, as I stated.
7 But under the plain terms of Section 13.1 of the plan, there
8 is no limit on when such motions could be made other than
9 that they have to be pending as of the effective date or on
10 the effective date. And if not, the contract would then be
11 deemed rejected.

12 It's clear to me from the language in 2.1 of the
13 Transform/district settlement agreement and the record of
14 this hearing that rather than simply allocate between
15 themselves the amount in dispute between themselves,
16 Transform and the district have sought further value in
17 their settlement agreement which would be derived from
18 Sears, or the debtors', rejection of the EDA. The district
19 has been quite candid in saying that that frees up potential
20 additional significant value to the taxing authorities. It
21 also appears to me to also take away significant value from
22 the Village of Hoffman Estates under the EDA. And not only
23 the debtors who don't understand why they should confer such
24 value in return for getting nothing but also the Village of
25 Hoffman Estates have objected to the motion.

1 It's clear that this motion's first basis for
2 relief, i.e., that the EDA agreement should be deemed
3 rejected under the plan is unsustainable. I've noted the
4 plan itself reserves rejection by its terms to the effective
5 date of the plan subject to a further extension if a motion
6 to assume is pending on the effective date or there's an
7 objection that's unresolved to a motion for assumption and
8 assignment on the effective date.

9 So even though it appears that Transform has
10 conditionally agreed subject to the steps they've taken in
11 2.1 of its settlement agreement with the district to
12 withdraw its designation of its EDA as an assumed and
13 assigned contract to it, that would not lead to the
14 rejection of the contract, under Section 13.1, because the
15 effective date has not yet occurred. That is, the effective
16 date of the plan has not occurred.

17 The Bankruptcy Code makes a distinction, as does
18 the plan, between confirmation of a plan and the effective
19 date of a plan. When a plan is confirmed, it has a certain
20 status. The plan proponent cannot change that status except
21 as provided for under Section 1127 of the Bankruptcy Code.
22 And no other party can modify the plan at all other than the
23 plan proponent or the reorganized debtor. So in that sense,
24 the plan controls. And certainly, the debtor has not
25 withdrawn the plan or sought to modify it, the debtor being

1 the plan proponent and as defined in the plan, the
2 reorganized debtor.

3 So I deny the motion's request on the first
4 alternative basis for relief.

5 The motion also seeks a determination under
6 Section 365(d)(2) of the Bankruptcy Code -- or an order,
7 that is -- directing at this time that the debtor assume or
8 reject the EDA agreement. There are a number of problems
9 with this alternative request for relief, however. First,
10 as I've noted, the plan itself has been confirmed. Section
11 365(d)(2) of the Bankruptcy Code says that "In a case under
12 chapter 11 of this title, the trustee" -- or debtor-in-
13 possession -- "may...reject an executory...at any time
14 before...confirmation of a plan but the court, on the
15 request of any party to such contract or lease, may order
16 the trustee to determine within a specified period of time
17 whether to assume or reject such contract or lease."

18 I'll repeat again the second clause. "[O]n the
19 request of any party to such contract or lease, [the court]
20 may order the trustee to determine within a specified period
21 of time whether to assume or reject..."

22 The import of this rule is that normally debtors
23 have until confirmation of a plan to assume or reject an
24 executory contract or unexpired lease. But that such
25 ability, under certain circumstances as developed in the

1 case law, may be curtailed on motion by a party to the
2 contract to shorten the time to assume or reject.

3 The school district is not a named party to the
4 contract. Plain and simple. The contract is between one of
5 the debtors and the Village of Hoffman Estates. It would
6 not therefore have standing under Section 365(d)(2) to make
7 such a motion. See *In re Riverside Nursing Home*, 43 B.R.
8 682, 684-85 (Bankr. S.D.N.Y. 1984).

9 Congress in the Bankruptcy Code specifically used
10 the phrase "party to such contract" as opposed to a phrase
11 that uses another section to the Code, "party-in-interest".
12 Even when it uses the phrase "party-in-interest", the case
13 law is clear that that does not encompass a person or entity
14 who is merely concerned in the contract, i.e., a creditor of
15 the contract party, such as a mortgage holder that, under
16 certain circumstances, would have a right to lease payments
17 be made directly to it under its agreement with the lessor
18 to a debtor. See, generally, the discussion in *In re Martin*
19 *Paint Stores*, 199 B.R. 258, 264 (Bankr. S.D.N.Y. 1996).

20 The district tries to get around this problem by
21 stating that the statute under which the EDA was enacted was
22 amended in 2011 to extend the term of the benefits of the
23 EDA and to explicitly set forth a mechanism for the Village
24 of Hoffman to distribute tax monies to various taxing
25 authorities apparently none of whom were specifically named.

1 The amendment was not embodied in the contract itself which
2 has an amendment and integration provision in Article 21.
3 And I conclude that those facts do not elevate the district
4 to being a party to the EDA agreement as required for
5 standing under Section 365(d)(2).

6 In addition, under the initial clause of Section
7 365(d)(2), a Chapter 11 debtor may reject an executory
8 contract any time before confirmation of a plan. As noted,
9 the plan here has been confirmed. The motion was made well
10 after the confirmation date and therefore runs afoul of that
11 well recognized directive in Section 365(d)(2).

12 The district tries to get around that provision by
13 noting the second clause of the sentence which I'll read for
14 the third time, namely, "but the court on the request of any
15 party to such contract or lease may order the trustee to
16 determine within a specified period of time whether to
17 assume or reject such contract or lease". The district
18 contends that that right to make a request transforms or
19 overcomes the time limitation in the first clause and
20 extends it effectively during the post-confirmation period.

21 I do not accept the logic of that argument. It is
22 true that this plan has been in the stage between
23 confirmation and the effective date longer than many Chapter
24 11 plans. But during that period, I believe that if
25 anything extends the time to assume or reject, it is the

1 plan itself, as I've discussed in Section 13.1.

2 There's a fairly substantial body of case law that
3 harmonizes a right of a plan proponent in a plan, under
4 Section 1123(b)(2) of the Bankruptcy Code, to provide in a
5 plan that the plan "subject to section 365 of this title,
6 provide for the assumption, rejection, or assignment of any
7 executory contract or unexpired lease of the debtor not
8 previously rejected under such section" in a way that
9 extends the deadline to assume, reject or assume and assign
10 an executory contract notwithstanding the time limit in
11 Section 365(b)(2). They find the ability to do that even
12 though Section 1123(b)(2) begins with the clause "subject to
13 section 365". See, for example, ReGen Capital I, Inc. v.
14 UAL Corp., In re UAL Corp., 635 F.3d 312, 320-321 (7th Cir.
15 2010) amended by, although not materially so, ReGen Capital
16 I, Inc. v. UAL Corp., In re UAL Corp., 2011 U.S. App. LEXIS
17 26341 (7th Cir. April 13, 2011). See also DJS Properties,
18 L.P. v. Simplot, 317 B.R. 493, 498-99 (D. Idaho 2008) and
19 the cases cited therein including In re Gunter Hotel
20 Associates, 96 B.R. 696 (Bankr. W.D. Texas 1988) and In re
21 Malden Mills Inc., 35 B.R. 71 (Bankr. D. Mass. 1983).

22 Ultimately, the theory behind these cases is if a
23 plan is confirmed because of the binding nature based on
24 both statutory and common law res judicata of a confirmed
25 plan, including under Section 1141 of the Bankruptcy Code,

1 it can alter a specific provision of the Code setting forth
2 a deadline, like Section 365(d)(2) but only, of course, to
3 the extent provided in the plan. That point is made clear
4 in In re WorldCom Inc. 2006 WL 89029 (Bankr. S.D.N.Y. March
5 9, 2006) at page 2 through 3 where Judge Gerber concluded
6 the executory contract would not be rejected post-
7 confirmation because the plan itself, which reserves certain
8 ability to deal with executory contracts post-confirmation,
9 i.e., to permit assumption of pending motions and
10 consideration of pending motions to reject, contact no
11 language reserving the right to seek rejection
12 post-confirmation. And unlike Section 13.1 of the plan, the
13 right to assume or assign was not reserved except as
14 specifically provided through the effective date unless the
15 plan provided, by its plain terms, for the subsequent right
16 to reject before the effective date and post-confirmation.
17 Therefore, the gap is filled by Section 365(d)(2)'s
18 requirement that rejection be pre-confirmation. Here, it
19 cannot be accelerated given the tie-in specifically to the
20 effective date in the plain terms of the plan.

21 Lastly, even if the district had standing to make
22 such a request under 365(d)(2), which it does not, even if
23 the Court had the ability to extend the rejection deadline
24 to a date post-confirmation other than the effective date as
25 provided in Section 13.1 of the plan, the motion does not

1 satisfy the requirements to compel assumption or rejection
2 under the case law. See *In re Dana Corp.*, 350 B.R. 144
3 (Bankr. S.D.N.Y. 2006).

4 The factors listed in that case are not all
5 relevant here and they needn't be but they help to guide the
6 Court's decision. They include:

7 The importance of the contract to the debtor's
8 business and reorganization;

9 The debtor's failure or ability to satisfy post-
10 petition obligations, including to the nondebtor contract
11 party; the nature of the interest at stake;

12 The balance of hurt to litigants and the good to
13 be achieved;

14 Whether the debtor has had sufficient time to
15 appraise its financial situation and potential value of its
16 assets in formulating the plan;

17 The safeguards afforded to litigants;

18 The damage that the nondebtor will suffer beyond
19 compensation available under the Bankruptcy Code;

20 Whether there is need for judicial determination
21 as to whether the executory contract exists;

22 Whether the exclusivity period has been
23 terminated;

24 Whether the action to be taken is so in derogation
25 of a congressional scheme that the Court may be said to be

1 arbitrary; and then finally

2 The purpose of Chapter 11, which is to permit
3 successful rehabilitation of debtors.

4 Now again, these factors don't all need to
5 pertain. For example, executory contract or an asset in a
6 liquidation case as well as evidenced by the assumption and
7 proposed assignment -- proposed assumption and assignment of
8 the EDA to Transform. And I've already discussed the fact
9 that this is a third tier of reason why the motion's second
10 prong for relief failed, namely, the fact that a plan has
11 been confirmed and specifically carves out certain rights
12 with respect to the debtors' right to reject agreements up
13 to the effective date -- or as of the effective date,
14 rather, subject to the specific narrow exceptions -- colors
15 the entire analysis.

16 What is relevant here are two major factors which
17 I tried to take into account. First is the time within
18 which the debtor has been given to evaluate what really are
19 new facts, a very recent proposed settlement, albeit
20 conditional, between the party that the debtor believed
21 would be taking the EDA, Transform, whereby now it appears
22 Transform would not be taking it, albeit on a conditional
23 basis.

24 Secondly, it is clear to me, as I said before as
25 part of this record, that there is real value in the

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1 agreement potentially to the debtors' estate as evidenced by
2 the extra relief by in their request now before me that
3 Transform and the district have conditioned their agreement
4 on. Bankruptcy policy argues that that value should go to
5 the debtor unless there are strong countervailing
6 considerations.

7 I am certainly sympathetic to the taxing
8 authorities' desire to get from under the EDA structure
9 generally so that they will not have to make up for that tax
10 benefit difference on the backs of their taxpayers.
11 However, certainly in the relatively near term before the
12 effective date of the plan occurs, which then would, of
13 course, trigger, the rejection or assumption deadline under
14 the plan itself in Section 13.1, Transform and the district
15 could have eliminated that economic impact without trying to
16 force the debtors' hand and, secondarily, the Village of
17 Hoffman's hand with this motion simply by Transform's giving
18 up the value without imposing conditions on it during that
19 period. They've chosen not to do that but instead to seek
20 this additional relief as far as the debtors' estate is
21 concerned.

22 So it does not appear to me that the district is,
23 if I deny this motion, suffering damage that it cannot
24 within its control with Transform resolve in the near term.
25 It's contended, although belatedly by a reply to the

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1 objection, that the debtor really doesn't have the ability,
2 either as a legal or as a practical matter, to assume and
3 assign an agreement with someone other than Transform.
4 Besides the fact that this issue was raised in their reply a
5 few days ago, it does not necessarily appear to me to be
6 true that that is the case. First, as I noted at the
7 beginning of this ruling, it appears to me that in the
8 settlement agreement with the district, the debtor reserved
9 its rights to assign and then its waiver of 2018 and
10 thereafter EDA funds was personal to it and did not -- would
11 not apply to its assignee defined generically as opposed to
12 Transform or some Transform entity as contemplated by the
13 APA.

14 Secondly, the very structure and conditional
15 nature of the Transform/school district settlement agreement
16 pretty clearly suggests that those parties believe that the
17 debtor has real rights under the EDA agreement to have
18 economic value and that there is economic value in the
19 termination of those rights by a, as the agreement says,
20 irrevocable rejection of the EDA agreement.

21 Moreover, at least based on this record, it
22 appears to me, including my review of Section 18 of the EDA
23 agreement, that the agreement is currently assignable if
24 Transform would ever actually file and irrevocably show,
25 which it has not yet done, unconditionally, that is, its

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1 withdrawal of the EDA as a contract to be assigned to it.

2 So although this is not required, I conclude that
3 even if one were to read into the plan, which would be the
4 only source for extending the deadline under Section
5 365(d)(2), an ability to compel rejection before the
6 effective date, which is provided nowhere in Section 13.1 of
7 the plan, even if one were to find standing under 365(d)(2)
8 that one would not on this record compel the debtors to
9 reject the EDA agreement.

10 So I will ask the debtors to submit an order
11 consistent with that ruling denying the motion. You don't
12 have to formally settle it on counsel for the district and
13 counsel for the Village but you should circulate it to them
14 and/or cc them when you e-mail it to chambers.

15 I trust that the parties may well be able to
16 resolve this matter without much more litigation. I have no
17 desire to increase the litigation load on the Cook County
18 Chancery Court or further litigation in this court. And I
19 trust the parties don't either. But at this point, it
20 appears to me that two parties to a dispute have tried to
21 resolve the dispute and on the backs of the debtor and the
22 Village of Hoffman Estates and, for the reasons I stated in
23 my ruling, that's just not going to work.

24 So I think that concludes today's hearing. Is
25 there any question or anything else for today in the Sears

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1 case?

2 MR. FRIEDMANN: Nothing for the debtors, Your
3 Honor. Thank you very much.

4 THE COURT: Okay. All right. Very well. So I'll
5 look for that order then.

6 MR. FRIEDMANN: Thank you.

7 MR. FLOREY: Thank you, Judge.

8 MR. GENSBURG: Thank you, Your Honor.

9 (Whereupon, these proceedings were concluded at 4:56 p.m.)

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1 I N D E X

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3 R U L I N G S

4

5 DESCRIPTION	PAGE	LINE
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6 Motion of Community Unit School District 300	79	11
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7 to deem economic development agreement

8 rejected or, in the alternative, to compel

9 debtors to reject agreement denied

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C E R T I F I C A T I O N

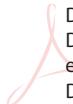
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3 I, Lisa Beck, certify that the foregoing transcript is a
4 true and accurate record of the proceedings.

5

Lisa Beck

6

 Digitally signed by Lisa Beck
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Lisa Beck

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